93-639

Supreme Court, U.S.
FILED
OCT 25 1993
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The First District

PETITION FOR A WRIT OF CERTIORARI

SILVIA SAFILLE IBANEZ
Counsel for Petitioner
659 Avenue A NW
Winter Haven, FL 33881
(813) 299-8553

J. LOFTON WESTMORELAND*
Counsel for Petitioner
900 Sun Bank Tower
Pensacola, FL 32598
(904) 434-3541

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9314

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE FLORIDA BOARD OF ACCOUNTANCY'S BLANKET BAN ON AN ATTORNEY/CPA'S TRUTHFUL AND VERIFIABLE USE OF THE APPELLATIONS, "CPA" AND "CFP," ON BUSINESS CARDS, LETTERHEAD, AND TELEPHONE BOOK LISTINGS, VIOLATES THE ATTORNEY'S FIRST AMENDMENT RIGHT TO COMMERCIAL SPEECH.

PARTIES TO THE PROCEEDING

The following party was the Plaintiff below and is the Respondent before this Court:

State of Florida, Department of Professional Regulation, Board of Accountancy

The following party was the Defendant below and is the Petitioner before this Court:

Silvia S. Ibanez

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED ON 11

REASONS FOR GRANTING PETITION 12

IMPORTANCE OF QUESTION PRESENTED 20

CONCLUSION 23

APPENDIX A: Order of the Florida District Court of Appeal, First District dated July 28, 1993 denying Petitioner's Motion for Rehearing 1a

APPENDIX B: Order of the Florida District Court of Appeal, First District dated June 9, 1993, affirming without opinion the Florida Board of Accountancy's Final Order 2a

APPENDIX C: Order of the Florida District Court of Appeal, First District dated June 9, 1993, denying Petitioner's Motion for Attorney Fees 3a

TABLE OF CONTENTS – Continued

Page

APPENDIX D: Final Order of the Florida Board of Accountancy dated April 23, 1992.....4a

APPENDIX E: Recommended Order of the Hearing Officer of the Florida Division of Administrative Hearings, on the merits, dated January 15, 1992.....22a

APPENDIX F: Petitioner's yellow pages advertising in the attorney section, subject of the disciplinary complaint.....53a

APPENDIX G: Petitioner's law practice business card.....54a

APPENDIX H: Petitioner's law office stationery....55a

APPENDIX I: Constitutional, statutory, and regulatory provisions:.....56a

United States Constitution, Amendment I.....56a

Statutory references to Chapter 473 and Chapter 455, Florida Statutes..57a

Regulatory references under Chapter 21-A of the Florida Administrative Code.....64a

TABLE OF AUTHORITIES

Page(s)

CASES:

Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992).....19

Bates v. State Bar of Arizona, 433 U.S. 350 (1977).....12

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989).....18

Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980)..... *passim*

Edenfield v. Fane, 507 U.S. ___, 123 L.Ed.2d 543, 113 S. Ct. ___ (1993).....6, 13, 17, 18, 19

Hynes v. Major of Oradell, 425 U.S. 610 (1976).....22, 23

Jenkins v. State, 385 So.2d 1356 (Fla. 1980).....3

Palmore v. Sidoti, 466 U.S. 429 (1984).....3

Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990).....13, 14, 20

Re R.M.J., 455 U.S. 191 (1982).....12, 14, 15, 16, 20

CONSTITUTION, STATUTES, REGULATION AND RULES

U.S. CONSTITUTION:

Amendment I ..... *passim*

FLORIDA CONSTITUTION:

Article V, Section 3(B)(3).....2

TABLE OF AUTHORITIES – Continued

Page(s)

FLORIDA STATUTES:

Section 120.57(1) Fla. Stat. 6

Section 473.302(4), Fla. Stat. 4

Section 473.303, Fla. Stat. 8

Section 473.323(1)(a), (f), (g), (h) 5

FLORIDA ADMINISTRATIVE CODE:

Rule 21A-20.011, F.A.C. 5

Rule 21A-20.012, F.A.C. 5

Rule 21A-24.001, F.A.C. 5

OTHER PUBLICATIONS:

Association to Back Attorney-CPAs In Fight Against Boards of Accountancy, THE ATTORNEY-CPA, Aug./Sept. 1987 at 1 21

Federal Trade Commission, Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984) 20

Florida Supreme Court Manual of Internal Operating Procedures II A1.(A) 2

D.J. Gibby, Environmental Exposure, FLORIDA CPA TODAY, April 1993 at 4 22

S. Ibanez, Florida's Sunshine Law, FLORIDA CPA TODAY, April 1992 at 36 22

No. _____

In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The First District

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Silvia S. Ibanez ("Ibanez" or "Petitioner"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the District Court of Appeal of Florida, First District, entered in this proceeding on June 9, 1993.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, dated July 28, 1993, denying Petitioner's Motion for Rehearing is reprinted at Appendix A, App. 1a. The order

of the Florida District Court of Appeal affirming, without opinion, the Florida Board of Accountancy ("Board") order was issued on June 9, 1993, and is unreported. It is reprinted at Appendix A, App. 2a, together with the Court's order denying attorney fees of the same date, at App. 3a. The opinion which was affirmed by the District Court of Appeal is the April 23, 1992, Order of the Board, also unreported, and reprinted at Appendix D, App. 4a. The Board's order, in turn, includes references to the finding of fact embodied in the recommended order of the Hearing Officer of the Florida Department of Administrative Hearings issued on January 15, 1992. It is unreported and reprinted at Appendix E, App. 22a.

JURISDICTION

The Order of Affirmance of the Florida District Court of Appeal, First District, was entered on June 9, 1993. Petitioner timely filed a Motion for Rehearing on June 23, 1993. On July 28, 1993 the First District Court of Appeal denied the Motion for Rehearing. That order is reprinted at Appendix A.

Jurisdiction of this Court to review this case on Certiorari rests on 28 U.S.C. Section 1257(a). Because the First District Court of Appeal elected not to write an opinion, the Supreme Court of Florida was without jurisdiction to review this case and the First District Court of Appeal is the highest Florida state Court in which a decision could be had. Fla. Const. Art. V Section 3(B)(3); Florida Supreme Court Manual of Internal Operating Procedures

II A1.(A); *Jenkins v. State* 385 So.2d 1356 (Fla. 1980); *Palmore v. Sidoti*, 466 U.S. 429 (1984).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution reprinted in Appendix I to this Petition.

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner is a practicing attorney, a member of the Florida Bar, and holds an active Florida CPA license in good standing. She is also a registered advisor with the Florida Division of Securities, as well as a certified financial planner ("CFP").

The CFP certification is conferred by the International Board of Standards and P ctice for Certified Financial Planners ("IBCFP"), a national organization.

The language in Petitioner's CPA certificate specifically authorizes her to display her CPA credentials:

> " . . . has passed all examinations and has met all other requirements prescribed by law and by rule of this Board for certification as an expert public accountant, and *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this Board as a certified public accountant.*" App. 26a.

As an active-licensed CPA, Petitioner is authorized to perform the attest function, known as auditing; she can also prepare financial statements or be associated with financial statements, perform tax return preparation services, perform estate, tax or financial planning services, perform all types of general accounting and bookkeeping activities, represent clients in IRS audits, perform management consulting services, and provide EDP/computer consulting services; perform litigation consulting services (i.e., expert witness); value closely held businesses, among other activities.[1]

Petitioner currently operates as a sole practitioner of law and provides legal services for her clients not provided by CPAs. As a tax attorney, part of her normal professional activities, includes tax opinion work, representation before the Internal Revenue Service, evaluation of the tax consequences of certain transactions, as well as financial and estate planning. In doing so, she utilizes both her legal education, training, and experience and her education, training and experience as a CPA.[2]

Petitioner does not perform the attest function of a public accountant, i.e., she does not audit, which all parties agree is the only function which rests exclusively with CPAs.[3]

Upon receiving an anonymous mailing of an attorney yellow pages sheet, Appendix F, with Petitioner's name which had the credentials "CPA" and "CFP" after her

---

[1] Pursuant to Sec. 473.302(4) Fla. Stat.

[2] See Finding No. 11 at App. 27a.

[3] See Finding No. 15 at App. 28a.

individual name, the Board initiated disciplinary proceedings against her. In essence, the Board alleged:

> COUNT I: Petitioner is misleading the public by using the CPA credential in connection with her law firm, "SILVIA S. IBANEZ, P.A."
>
> COUNT II: Petitioner's use of the CFP credential in the attorney yellow pages and on her law practice business card, Appendix G at App. 54a, constitutes false and misleading advertising of the practice of public accounting.
>
> COUNT III: Petitioner's use of the CPA credential in the attorney yellow pages misleads the public into believing that she has complied with the Board's regulations and related Florida statutes.[4]

B. OPINION OF THE BOARD

The Board reprimanded Petitioner solely because she appended the credentials "CPA" and "CFP" after her name in the "attorney" section of the telephone yellow pages. [See exhibit of the advertisement at Appendix F.] The Board found this listing to constitute "improper use" or misleading use of the credential, "CPA" (App. 15a) and "inherently misleading" advertising, as to the use of "CFP." App. 19a. Moreover, the Board found the use of

---

[4] These counts are summarized from the record, but are explained in depth at App. 23a, and again at App. 45a, 46a and 47a. In turn, the rules and statutes cited therein have been reproduced at Appendix I, App. 59a to 68a, specifically Sec. 473.323(1)(a)(f)(g)(h), Fla. Stat. and Rules 21A-20.011, 21A-20.012 and 21A-24.001 F.A.C.

CFP to be "false, deceptive, and misleading advertising" App. 20a.

Under the Florida Administrative Procedure Act, a formal administrative hearing was held before an impartial hearing officer, pursuant to Sec. 120.57(1) Fla. Stat. Such a hearing is in the nature of a trial. The hearing officer's findings are important in evaluating this Petition for certiorari.

The first "expert" called by the Board was Mr. Louis Dooner, the same expert used by the Board in *Edenfield v. Fane*, 507 U.S. ___, 123 L.Ed.2d 543, 113 S. Ct. ___ (1993). Mr. Dooner testified that Petitioner's use of the CPA designation on her attorney business card tells the public that she is offering to perform CPA services. App. 27a. He did not substantiate his conclusion with empirical studies or surveys. The hearing officer did not find credible the Board's witness, Department of Professional Regulation employee, Elise Rice (App. 30a); and the Board's other witness, Ms. Martha Willis, Executive Director of the Board, could not explain why the Board deems CFP to be a specialty of public accounting. App. 32a. Petitioner presented the expert witness, Mr. Robert Goss, who is the Executive Director of the IBCFP. The hearing officer concluded, based on the evidence, that the CFP designation is not a specialty of public accounting. App. 47a-48a.

Upon reviewing the type of professional services Petitioner renders, the Board conceded that Petitioner does not render "attest" services. "Attest" services are the only ones exclusively within a CPA's domain. The Board also agreed that many other CPA activities overlap with

activities performed by other non-CPA professionals, presumably including attorneys, App. 6a.

The hearing officer, at the conclusion of the administrative trial and after considering factual and legal arguments presented by the Petitioner and the Board, issued a recommended order that the complaint filed against Ibanez be dismissed.[5]

In reaching her conclusion that the use of the truthful credentials "CPA" and "CFP" were not misleading and did not constitute deceptive advertising, as alleged by the Board, the hearing officer made these factual findings:

> *"Paragraph 13:*
>
> Truthful use, communication, or disclosure of the CPA credential by an actively licensed CPA does not per se constitute false, misleading, or deceptive advertising. The evidence does not support a finding that withholding truthful disclosure that one has earned the CPA credential benefits the public welfare or effects the purposes of the enabling legislation, or indeed, how such nondisclosure could promote them, particularly since it has been shown that persons of considerably lesser competency and achievement levels in the discipline of accounting may legally offer to the public almost all the services provided by CPAs.

---

[5] Under the Florida Administrative Procedure Act, *supra*, the hearing officer's order is forwarded to the regulatory board in question, to be followed or rejected, wholly or partly. In this case, the regulatory board is the Florida Board of Accountancy, under the Department of Professional Regulation ("DPR").

"Paragraph 14:

> The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual. See App. 28a and 30a.

Based on the findings of facts and conclusions of law, the hearing officer advised the Board to dismiss all charges because Ibanez is not practicing public accounting. Alternatively, the hearing officer concluded that even if Ibanez were considered to be practicing public accounting, none of the counts against her were proven. App. 48a and 49a.

Upon rejecting the hearing officer's order, the Board of Accountancy[6] stated several conclusions:

1. Although there is a general exclusion from the Board's jurisdiction over certain CPAs, as an attorney, Petitioner does not come within the exclusion because she deals with the public. Footnote 3 at App. 8a.

2. Petitioner's failure to license her law firm as a CPA firm is regarded as tantamount to being an "unlicensed"[7] CPA. App. 11a.

---

[6] Per Sec. 473.303, Fla. Stat., a majority of the Board members are CPAs who practice public accounting as their primary occupation.

[7] Though the Board's order vaguely suggests that Petitioner is "unlicensed" because her law firm is unlicensed, this point is moot because the "unlicensed firm" allegation was withdrawn. Paragraph 22 at App. 45a.

3. The Board characterized Petitioner's truthful disclosure of her CPA credential as an "inducement" and "inherently misleading," rather than of benefit to the public. App. 15a.

These conclusions, although unsupported by the record or by any reasoning, form the basis for the Board's finding that Petitioner's attorney advertising, which is concededly commercial speech, is false and misleading and must be banned. App. 19a and 20a.

The Board, in an obvious effort to prevent non-practicing CPAs from letting the consumer public know of such professionals' qualifications, found that the public in Florida could be misled by Petitioner's use of her CPA credential in the attorney yellow page listing. According to the Board, Ibanez's mere disclosure of the CPA and CFP credentials in her attorney yellow page listing conveys two messages to the public: 1) that she is subject, now, to the technical standards for the practice of public accounting promulgated by the Board, and 2) that she will continue to comply, in the future, with the Board's regulations.[8] Thus, a simple disclosure of credentials was converted into a complex regulatory determination, which also rests on speculation. As to the use of the CFP

---

[8] Implicitly, the Board speculated that, as an attorney, Ibanez will not always be in compliance with its regulations, in the future, and this hypothetical event is the cause for disciplining Ibanez now. The Board uses the example of contingency fees, which attorneys customarily accept, but are prohibited under Chapter 473, Fla.Stat. See Footnote 2. at App. 6a.

credential, the Board issued its order finding Ibanez guilty of deceptive advertising after conducting a constitutional analysis under the case of *Central Hudson Gas and Electric Corp. v. Public Comm'n of New York*, 447 U.S. 557 (1980). This analysis resulted in the Board concluding that:

> " . . . it is apparent that Respondent [Petitioner herein] has advertised the fact that she is a CFP or Certified Financial Planner, which, in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, has been determined by the Board to be false, deceptive and misleading advertising by implying a specialty of public accountancy, not recognized by the Board of Accountancy." App. 20a.

The Board then imposed its reprimand, with the imposition being stayed until "any appellate proceedings" were completed.

C. ORDER OF THE APPELLATE COURT

Petitioner appealed the Board's order to the District Court of Appeal, First District of Florida, which affirmed the Board's decision, without opinion, on June 9, 1993. Thereupon, Petitioner filed a request for rehearing which was denied on July 28, 1993. These orders are reprinted at Appendix A and B, respectively.[9] On September 23, 1993, Petitioner requested the Board to stay her reprimand

---

[9] The Appellate Court's order denying attorney fees, App. C, accompanied the Per Curiam order.

pending the disposition of her Petition for Certiorari; her motion was denied.

HOW THE FEDERAL QUESTION WAS RAISED AND PASSED ON

Upon being served with an administrative complaint on June 13, 1991, Petitioner filed a response on July 12, 1991, and raised various affirmative defenses. The principal constitutional issue was:

> *"Paragraph 13.* Ibanez's disclosure in the phone book that she is certified as a CPA and financial planner is disclosure of nonmisleading, truthful, constitutionally protected commercial speech."

Subsequently, DPR filed an Amended Administrative Complaint on July 30, 1991, which Petitioner responded to on August 26, 1991, and wherein the same affirmative defense was again reiterated. On January 15, 1992, Hearing Officer Ella Jane P. Davis issued a recommended order finding no wrongdoing on the part of Petitioner without reaching the federal questions.

The Board's order finding fault with Petitioner included discussion of commercial free speech protection, and whether it should be afforded to Petitioner under the First Amendment and relevant case law.

Petitioner's appellate briefs to the Florida District Court of Appeal, First District, reiterated previously asserted affirmative defenses, including the First Amendment violation discussed herein, as well as violations of her due process and equal protection rights. Petitioner also asserted that the Board's restriction on Petitioner's truthful use of her CPA and CFP credentials violates

Federal laws, is anti-competitive, and interferes with interstate commerce. The First District Court of Appeal issued a PER CURIAM decision, without opinion.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS WHICH PROHIBIT BLANKET SUPPRESSION OF COMMERCIAL FREE SPEECH.

The decision below constitutes a blanket ban on commercial speech. The Board of Accountancy reprimanded Petitioner for truthfully appending CPA and CFP to her name in advertisements and on her letterhead and business cards. The effect of this decision is to suppress Petitioner, and others who hold multiple professional credentials, from advertising the true fact that in addition to being an attorney, she is also a certified public accountant and certified financial planner.

A. Importance Of Commercial Speech

This Court has construed the First Amendment to protect truthful descriptions of the price and terms of routine legal services. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). This Court has also recognized First Amendment protection for speech concerning the ability of professionals rendering services. For example, in *Re R.M.J.*, 455 U.S. 191 (1982), this Court struck down certain advertising restrictions promulgated by the Missouri Bar including bans on describing areas of practice, listing

Courts and states in which the lawyer had been admitted to practice, and the wide-scale mailing of announcement cards.

In *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), this Court overturned the public censure of an attorney by the Illinois Supreme Court where the attorney had used the letterhead claiming certification as a trial specialist by the National Board of Trial Advocacy.

Recently, in *Edenfield v. Fane*, 507 U.S. ___, 123 L.Ed.2d 543, 113 S. Ct. ___ (1993), these protections were extended to certified public accountants. Under the First Amendment, as confirmed by prior decisions of this Court, Petitioner is entitled truthfully to advertise and communicate truthful, non-deceptive information. These are types of commercial expression to which the protections of the First Amendment apply. *Edenfield v. Fane, supra.*

This Court's general approach for determining the constitutionality of restrictions on commercial speech, including the commercial speech of attorneys, is set forth in *Central Hudson Gas and Electric Corp. v. Public Comm'n*, 447 U.S. 557, 564 (1980). Under that test, commercial speech is entitled to constitutional protection if it is "neither misleading nor related to unlawful activity". If the communication meets that threshold test, it may then be restricted only if (a) the government asserts a substantial interest to be achieved by the restrictions, (b) the restrictions directly advance the government's asserted interest, and (c) the restrictions are no more extensive than is reasonably necessary to effectuate that interest. *Central Hudson* at 564 and 566.

B. Petitioner's Expressions Are Truthful

In *Peel, supra,* the attorney stated on his letterhead that he was certified as a trial specialist by the National Board of Trial Advocacy. 496 U.S. at 92, 93. This Court observed that the facts stated on the letterhead were true and verifiable. Additionally, this Court noted that there was no contention that any potential client or person was misled or deceived by Peel's stationery. 496 U.S. at 100.

The Florida Board of Accountancy acknowledged that Petitioner was indeed both a CPA and CFP. Furthermore, the Board acknowledged that Petitioner's CPA certificate states that she is entitled to append the letters CPA after her name to evidence registration by the Board of Accountancy as a certified public accountant.[10] Therefore, Petitioner's advertisement that she is a CPA and a CFP is true and verifiable. As such, it is not subject to blanket suppression by the Board.

C. Petitioner's Advertising That She Is A CPA And CFP Is Not Potentially Misleading

In this Court's decision in *Re R.M.J.*, 455 U.S. 191, the Court stated that although truthful advertising is entitled to the protections of the First Amendment,

> " . . . when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the

[10] In the Board's Final Order, it acknowledges the Hearing Officer's findings of facts to this effect. See Order at App. 5a, [at App. 26a].

> States may impose appropriate restrictions. 455 U.S. at 203.

In this case, the Board of Accountancy found that Petitioner's use of the appellation "CPA" was inherently misleading.[11] However, Petitioner is, in fact, a licensee subject to the rules of the Board of Accountancy. The Board's vague concern regarding the fact that Petitioner's law practice professional association is not licensed as a public accounting firm has no bearing whatsoever on the fact that Petitioner is a certified public accountant entitled to advertise that fact. Equally abstract is the Board's concern that some member of the public might think that Silvia S. Ibanez, P.A., printed on her law firm's letterhead [see Exhibit at Appendix H at App. 55a], is a licensed public accounting firm. These concerns do not render Petitioner's use of the appellation "CPA", after her individual name, misleading.

D. The Board Has No Substantial Interest In Totally Suppressing Petitioner's Advertising Of Her CPA And CFP Credentials

The state must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Re R.M.J.*, 455 U.S. at 203, citing *Central Hudson Gas and Electric Corp. v. Public Comm'n*, 447 U.S. 557, 563, 564 (1980). Although the Board of Accountancy

[11] Because potential clients "would clearly see respondent's use of the titles "CPA" in her advertisements as an inducement to contact Petitioner and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy (Board Opinion, App. 15a).

asserts that it is obvious that the regulation of the practice of public accountancy is a valid governmental interest, it is the blanket ban (not the regulation) which must pass muster on this second prong of the test. Here, the Board has failed to identify any substantial interest in a rule that prohibits a CPA from advertising the fact that she is a CPA. Similarly, in *Re R.M.J.*, this Court found that the advisory committee failed to identify any substantial interest in a rule that totally prohibits a lawyer from identifying the jurisdiction in which he is licensed to practice. The Court stated that such information was not misleading on its face but was instead, factual and highly relevant information. 455 U.S. at 205.

Applying *Central Hudson* to this case, it is apparent the Florida Board of Accountancy has failed to satisfy the second prong. At this point, the Court's analysis may cease because the rest of the *Central Hudson* test is contingent on there being a "substantial government interest" asserted. Such an interest is lacking here. However, the analysis will continue assuming, arguendo, that this Court were to find there is a substantial government interest.

E. The Board's Total Ban Of Petitioner's Advertising Does Not Advance The State's Interest

The third prong of the *Central Hudson* test is whether the regulation directly advances the governmental interest asserted. *Central Hudson*, 447 U.S. at 566. The Florida Board of Accountancy asserted that their blanket ban would ensure "that only an individual who meets certain standards is permitted to call oneself a CPA." App. 13a.

Yet, Petitioner has met all standards which permit her to call herself a CPA.

Most recently in the *Edenfield* case, this Court stated the burden of restricting commercial speech is not satisfied by –

> "mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, at 123 L.Ed.2d 543, 555.

In this case, the Board did not, in its Order, identify a single individual who had been misled by Petitioner's advertisement of the appellations CPA and CFP. The hearing officer noted that the Board failed to prove that any consumer in Florida had been misled by Petitioner's advertisements. App. 32a. The Board's primary witness was Louis Dooner. Mr. Dooner's conclusionary statement was nothing more than "conjecture" as to the effect of Petitioner's use of CPA designation on the public. In *Edenfield, supra*, at 556, this Court rejected his testimony because it was based on conjecture. Mr. Dooner's testimony in this case is similarly objectionable.[12] Ms. Martha Willis, Executive Director of the Board, could also not identify any party who had been misled by Petitioner. The Board's third witness, Ms. Elise Rice, was not found to be credible. Arguendo, if she were, Ms. Rice did not connect CFP as a specialty of public accountancy. App.

---

[12] It is significant that the Board would use the same "expert" to suppress the First Amendment rights of attorneys/CPAs, as it used to suppress First Amendment rights of CPAs.

30a. Nor did the Board identify a single study or empirical data to substantiate its abstract concerns. [Finding #25 at App. 32a]

In light of the foregoing, the conclusion that Petitioner misled anyone was mere "speculation" which this Court in *Edenfield* held to be insufficient to satisfy the burden of justifying a restriction on commercial speech. Accordingly, the third prong of the *Central Hudson* test was not satisfied by the Board of Accountancy.

F. The Board's Order Was More Extensive Than Necessary

The last prong of the *Central Hudson* test is whether the State's restrictions are more extensive than is necessary to achieve the state's interest. *Central Hudson*, 447 U.S. at 566. As the Court explained in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), while this last prong of the *Central Hudson* test does not require the state to use the least restrictive means to achieve its interest, it does require the state to employ "a means narrowly tailored to achieve the desired objective." 492 U.S. at 469, 480. The Board found that because Petitioner's use of the appellation "CPA" was inherently misleading that the "Board's position that a CPA must comply with the statutes and rules when trading upon the fact of licensure as a CPA, constitutes a 'reasonable fit' for constitutional purposes". App. 15a-16a.

The Board conducted no in-depth analysis under *Central Hudson* with respect to Petitioner's use of the appellation "CFP". Instead, the Board concluded that Petitioner's use of the designation "CFP" was inherently

deceptive and misleading advertising by implying a specialty of public accountancy not recognized by the Board of Accountancy, App. 20a.

These conclusions are directly contrary to this Court's ruling in *Edenfield*, which held that where the prohibitions do not serve the purposes of the state in a direct and material manner, the restriction "cannot be, by definition, a reasonable time, place, or manner restriction." *Edenfield, supra,* at 557. Accordingly, because the Board's restriction on Petitioner's speech lacks a substantial relationship to the governmental interested asserted, it is not necessary for this Court to consider the fourth prong of the *Central Hudson* test.

Clearly, the order of the Board demonstrates that no consideration whatsoever was given to employing "means narrowly tailored to achieve the desired objective", other than a total suppression of Petitioner's advertising the CPA and CFP marks. The final prong of the *Central Hudson* test was not satisfied by the Board of Accountancy because the ban imposed by the Board cannot be held to advance the Board's interest.

In light of the foregoing, the Board's absolute prohibition of Petitioner's speech in the form of a reprimand by the Board of Accountancy, does not meet *Central Hudson's* requirements for permissible restriction of First Amendment commercial free speech.[13] Thus, the Board's

---

[13] In its Order, the Board relied upon the Eleventh Circuit decision of *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992) but misunderstands or misapplies the ruling therein. *Abramson* supports Petitioner's argument – "As long as commercial

order is in conflict with all of this Court's decisions on commercial free speech.

IMPORTANCE OF QUESTION PRESENTED

In *Peel*, 496 U.S. 91, 111, n. 18, this Court noted that a principal reason why consumers do not consult lawyers is "because they do not know how to find a lawyer able to assist them with their particular problems." Citing Federal Trade Commission, Staff Report on *Improving Consumer Access To Legal Services: The Case For Removing Restrictions On Truthful Advertising* (1984). The Court also noted that information about certification and specialties facilitates consumers' access to legal services and thus better serves the administration of justice. *Re R.M.J.*, 455 U.S. at 199, 200.

The Petitioner defended the disciplinary charges in this case on the additional grounds of, *inter alia*, substantive due process as well as equal protection. Although the Board of Accountancy did not rule on these issues and restricted its decision to First Amendment grounds, there can be no question that the effect of reprimanding Petitioner for advertising that she is a CPA and a CFP has grave implications for the entire legal profession. Already there are attorneys who are also certified public

---

speech describes lawful activity and is truthful and not fraudulent or misleading, it is entitled to the protections of the First Amendment." at 1575.

accountants who are being singled out in various states,[14] and are understandably hesitant to advertise their credentials for fear of being disciplined. Consequently, prospective clients will not know which attorneys have specific skills which are pertinent to their legal problem. The effect of this is a prophylactic ban on professionals disclosing and advertising their credentials and skills, all to the detriment of the public.

Another major problem which is engendered by a decision, such as the one for which Ibanez seeks review, is the fact that among the various states, the Boards of Accountancy undoubtedly decide on a case by case fashion, whether attorneys are allowed to advertise the fact of their licensure as a certified public accountant and a certified financial planner. This undoubtedly results in attorneys being able to advertise their CPA licensure in some states, but not others. This will result in inconsistency and confusion throughout the country on this question.

In fact, the evidence in this case indicated that the Florida Board of Accountancy, itself, rendered inconsistent decisions on which attorneys are permitted to advertise the "CPA" appellation. For example, some attorney/

---

[14] See Article entitled, **"ASSOCIATION TO BACK ATTORNEY-CPAS IN FIGHT AGAINST BOARDS OF ACCOUNTANCY"**, *THE ATTORNEY-CPA*, newsletter issue Vol. XXIII, Number 4, dated August/September, 1987, which involve disciplinary complaints leveled against Texas Attorney-CPA Thomas W. McCulloch, and Florida Attorney-CPA, Leonard G. Weisberg.

CPAs have been granted the right to use their credentials[15] and others[16], like Petitioner, have been denied.

In fact, it is ironic that the April 1993 issue of the *Florida CPA Today* magazine, published by the Florida Institute of Certified Public Accountants ("FICPA") features an article written by one Daniel J. Gibby, who has stated in biographical information accompanying his article that he is a "JD, CPA." (at page 10) Like Gibby, Petitioner submitted biographical information, i.e., CPA, CFP, to accompany her article, in the same magazine. Yet, it is difficult to reconcile the suppression of Petitioner's CPA and CFP credentials from Petitioner's name when the magazine published her article in its issue of *Florida CPA Today* dated April, 1992. Obviously, all CPAs in Florida are not treated equally. Though the magazine cited is published by the Florida Institute of CPAs, its editorial actions understandably mirror the confusing and arbitrary posture taken by the State's regulatory agency, the Florida Board of Accountancy.

It must be emphasized that no statute, rule, or regulation prohibited Petitioner from advertising that she is a CPA and CFP. Nevertheless, she was in fact reprimanded for doing so. In *Hynes v. Major of Oradell*, 425 U.S. 610 (1976), this Court held that:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as

---

[15] Per Official Board Opinion to Attorney/CPA Steinman on April 12, 1988, at page R-339 of the Appellate Record.

[16] Per Official Board Opinion to Attorney/CPA Damitz on February 2, 1988, at page R-336 of the Appellate Record.

> to what the state commands or forbids". at 621-622.

In *Hynes*, a non-commercial speech case, the Court held that the law in question "may trap the innocent by not providing fair warning." Nor did the ordinance "provide explicit standards for those who apply." 408 U.S. at 622. Without any consistency in how the various boards of accountancy would decide this issue, the question as to whether an attorney may advertise his CPA and CFP appellation is a matter of national significance with attorneys throughout the country potentially falling into a trap for the unwary.

CONCLUSION

The Board's absolute ban on Petitioner's advertising of her credentials conflicts with the First Amendment and with all interpretative decisions of this Court. For these reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

J. LOFTON WESTMORELAND*
Attorney for Petitioner
900 Sun Bank Tower
Pensacola, FL 32598
(904) 434-3541

SILVIA SAFILLE IBANEZ
659 Avenue A, N.W.
Winter Haven, FL 33881
(813) 299-8553

*Counsel of Record

October 22, 1993

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

July 28, 1993

CASE NO: 92-01994

L.T. CASE NO.
91-4100

Silvia S. Ibanez — v. State of Florida, Dept. of Professional Reg.

Appellant(s), — Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing filed, June 23, 1993, is hereby DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: Rhonda Causseaux
Deputy Clerk

Copies:
Silvia S. Lbanez
Lisa S. Nelson
Kathryn L. Kasprzak
J. Lofton Westmoreland
Charles F. Tunnicliff
Robin Harmon, Clerk

[SEAL]

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SILVIA, S. IBANEZ,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-1994.

Opinion filed June 9, 1993.

Appeal from an order of the Department of Professional Regulation.

Silvia S. Ibanez, P.A., Winter Haven and J. Lofton Westmoreland, of Moore, Hill & Westmoreland, Pensacola, for appellant.

Lisa S. Nelson, Assistant General Counsel, Tallahassee, for appellee.

PER CURIAM.

AFFIRMED.

ZEHMER, BARFIELD, and MICKLE, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

June 9, 1993

CASE NO: 92-01994

L.T. CASE NO.
91-4100

Silvia S. Ibanez v. State of Florida, Dept. of Professional Reg.

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Appellant's motion for attorney's fees is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: Laurie Black
Deputy Clerk

[SEAL]

Copies:
Silvia S. Lbanez
Lisa S. Nelson
Ka[illegible]n L. Kasprzak
J. Lofton Westmoreland
Charles F. Tunnicliff

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF ACCOUNTANCY

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Petitioner,

vs.

SILVIA IBANEZ,

Respondent.

_____/

DOAH CASE NO. 91-4100
DPR CASE NO. 90-13805

FINAL ORDER OF THE BOARD OF ACCOUNTANCY

(Filed May 12, 1992)

THIS CAUSE came on before the Florida Board of Accountancy at a regularly scheduled meeting on April 23, 1992 in Tampa, Florida pursuant to a Proposed Recommended Order of Hearing Officer, Ella Jane P. Davis dated January 15, 1992. The Board, noting that no exception [sic] have been filed and after reviewing the complete record, including all exhibits, hereby enters this Final Order of the Board of Accountancy.

FINDINGS OF FACT

The Board after a complete review of the record and the transcript of the hearing in the above-style cause,

hereby accepts the Proposed Findings of Fact of the Hearing Officer as set forth in her Recommended Order of January 15, 1992, with the exception of the following:

The second sentence of paragraph 7, and paragraphs 13, 21 and 23 of the Proposing [sic] Findings of Fact are legal conclusions and should not properly be in the Proposed Finding of Fact and are therefore struck. As to Proposed Finding of Fact No. 24, the next to the last sentence is partially incorrect, insofar as the Board has adopted a rule (Rule 21A-24.001(1)(g)-(j) [specifically Rule 21A-24.001(1)(i)]) setting forth, in rule form, the Board's policy as to the use of the term "certified" and its relationship to false, fraudulent, deceptive and misleading advertising. As such therefore, for purposes of the disciplinary action, neither the Department of Professional Regulation, nor the Board of Accountancy (which is a nominal party to the disciplinary action) is required to prove up the rationale for that rule. Paragraph 27 is struck as a legal conclusion inappropriately found in the Proposed Findings of Fact.

CONCLUSIONS OF LAW

The Conclusions of Law of the Hearing Officer in her Recommended Order of January 15, 1992 erroneously misapply the provisions of Chapter 473, F.S., and Chapter 21A, F.A.C., as well as misanalyze applicable provisions of the United States Constitution relating to regulations on commercial speech. In light of the foregoing, the Board of Accountancy is compelled to reject the Conclusions of Law of the Hearing Officer, and to substitute the following.

I

Initially it should be noted that, with the exception of the attest function,[1] all other activities of certified public accountants are activities which are not prohibited to any non-CPA in the State of Florida. As a result, with the exception of the attest function, Chapter 473, F.S., is a "Title Act." To the extent that Chapter 473 is a Title Act, its sole purpose is to provide consumers with the knowledge that if they use a CPA's services, and those services are within the practice of public accounting, as defined in Section 473.302(4), F.S., that a CPA will be subject to technical, educational and other standards promulgated by the Florida Legislature and the Board of Accountancy. Further, a consumer is assured that the CPA will adhere to certain regulatory requirements deemed necessary by the Legislature of the State of Florida to assure the independence, objectivity and integrity of the CPA.[2]

---

[1] The attest function is defined as the independent opining on the truth and accuracy of financial statements, and is a function which is specifically permitted only to certified public accountants, see Section 473.322(1)(c), F.S.

[2] Including *inter alia*, Section 473.315,F.S., and Rule 21A-22, technical standards mandated by the legislature and promulgated by the Board of Accountancy; prohibitions on commissions and contingent fees, Section 473.3205, and 473.31, F.S.; requirements that a CPA not violate any of the disciplinary provisions of Chapter 473.323 and Rule 21A-36, that a CPA's practice will comply with the licensure of partnerships corporations, and rules promulgated thereunder, see Section 473.309, and 473.3101, F.S. All of the foregoing are in addition to 473.322(1)(b), F.S., which requires that any individual using the term "CPA" in the State of Florida must hold an active license (including meeting all continuing education requirements) from the Board of Accountancy.

As was noted in *Abramson v. Gonzalez*, 949 F.2d 1565 (11th Cir. 1992), as well as *Smith v. California*, 336 F.2d 530 (9th Cir. 1964), the function of a Title Act is not to preclude individuals who *are not* licensed from performing a certain set of tasks, but rather to let the public know that those individuals who *are* licensed have met, and continue to meet, the standards set out by the legislature and the appropriate regulatory boards through statutes and rules.

In light of the foregoing, it is necessary to address what, under Florida Statutes, is the practice of public accountancy. The provisions of Section 473.302(4), F.S. define the practice of public accountancy as follows:

> "Practice of," "practicing public accountancy," or "public accounting" means:
>
> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory of consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory or consulting services, by any other person holding himself or itself out as a certified public accountant or a firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

> However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

The Board of Accountancy has further refined the term in question through the promulgation of both Rule 21A-20.011, F.A.C,[3] excluding certain activities from the practice of public accountancy," and Rule 21A-20.012, F.A.C.,[4]

---

[3] This rule was promulgated to exempt certain activities of CPAs, from the practice of public accountancy either when those CPAs are not, in fact, offering accounting services to the public, but only to their employer, or when they are not associated with financial statements and/or when they are not holding themselves out as certified public accountants. The rule was promulgated in order to address the concerns raised in *Cenac v. Florida State Board of Accountancy*, 399 So.2d 1013 (Fla. 1st DCA 1981). In *Cenac*, the First District Court of Appeal clearly indicated that to define the practice of public accountancy so as to foreclose the use of the broad range of accountancy skills to CPAs who do not trade on the fact of their licensure through advertising or public display of the appellation "CPA," and who are not engaged in the preparation of financial statements, could result in an unconstitutional and unreasonable attempt to regulate and prohibit activities of individuals who happen to hold licenses as CPAs, but who do not trade on the fact of their licensure as CPAs.

[4] This rule has recently been declared invalid, see *Ibanez et al., v. State Board of Accountancy et al.*, DOAH Case No. 91-3336R, Opinion rendered January 15, 1992. Appeals pending before the First District Court of Appeal Case Nos. 92-439, 92-440. While

defining the term "holding out" which is contained in Section 473.302(4)(b), F.S.

To the extent therefore, however, that a CPA is providing one or more types of accounting skills and management advistory [sic] services to the public, and at the same time holding himself or herself out as a CPA, such an individual is practicing public accounting. Any other construction of the definition of the practice of public accounting would permit individuals, engaged in offering accounting services to the public and holding the CPA license, to trade upon the fact of their licensure, and to advertise that fact, while not being subject to the statutes and rules governing CPAs in the State of Florida. It is difficult to conceive how, to the extent Chapter 473 is a Title Act, it could legitimately be said to protect the public health, safety and welfare, if individuals who trade on that Ti‘le in commerce while using their accounting skills for the public, are not subject to the jurisdiction of the Board of Accountancy.[5]

---

the Board could rely on Rule 21A-20.012 pending the appeal, see Rule 9.310(b)(2), Fla.R.App.P., the Board's ruling in the instant cause is based solely upon the provisions of Chapter 473 and *other* applicable rules.

[5] It is specifically to be noted that other than by committing acts of fraud, see Section 473.323(1)(k), F.S., or lack of good moral character, see Section 473.323(1)(m), F.S., or similar violations CPAs can only be disciplined by the Board of Accountancy, if they are practicing public accountancy, and they are found guilty of the violations set forth in Section 473.323, F.S. In other words, with the above mentioned exceptions, CPAs who are not practicing public accountancy can not [sic] be disciplined by the Board of Accountancy for their transgressions.

The Hearing Officer, in coming to her conclusion that Respondent was not practicing public accountancy, and thus can not [sic] be guilty of false, fraudulent, deceptive or misleading advertising, depended largely upon a constitutional analysis, which, in the Board's opinion, is flawed. As is noted above, with the exception of the attest function (not at issue herein, since Respondent does not perform the attest function), Chapter 473 and [sic] is a Title, not a Practice act.

In *Abramson v. Gonzalez, supra,* at pp. 1575-1577, the Eleventh U.S. Circuit Court of Appeals analyzed at length the impact of Title Acts, as they relate to First Amendment guarantees of freedom of speech. While holding that unlicensed individ-uals [sic] cannot be prohibited from using generic terms, which described activities that they are permitted to perform under a Title Act, the Eleventh Circuit was firm in its opinion, that, if "unlicensed" individuals call themselves "licensed", they would be engaging in false, deceptive or misleading advertising and be subjected to penal provisions, including criminal and injunctive proceedings.

In the instant cause, Respondent is essentially engaged in the same type of activity which the Eleventh Circuit held could be banned by the State. In other words, Respondent advertises the fact that the [sic] she is a CPA, while performing the same "accounting" activities she performed when she worked for licensed CPA firms, but she does not concede that she is engaged in the practice of public accounting so as to bring herself within the jurisdiction of the Board of Accountancy for any negligence or errors she may be guilty when delivering her services to her clients.

Respondent is unwilling to acquiesce in the requirements of Chapter 473 and Chapter 21A, F.A.C., by complying with those requirements. She does not license her firm as a CPA firm; forego certain forms of remuneration denied to individuals who are practicing public accountancy; or limit the ownership of her firm to other CPAs. Respondent places the term "CPA" after her name on her business cards and letterhead, and in the yellow pages of the telephone directory all of which, by any standard, must be considered advertising.[6] Respondent further offers services to the public which, by her own admission, involve the use of the same accounting skills she used when she was performing accounting services in a CPA firm by so doing. Respondent has, in effect, told the public that she is subject to the provisions of Chapter 473, and the jurisdiction of the Board of Accountancy when she believes and acts as though she is not.[7] In light of the foregoing, Respondent is in violation of Rule 21A-24.001

---

[6] See *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 108 S.Ct. 1916 100 L.Ed.2d 475 (1988), *Peel v. Attorney Registration and Disciplinary Com'n.*, ___ U.S. ___, 110 S.Ct. 2281, 2287 (1990), Rule 4-7.2 Rules of the Florida Bar.

[7] It is to be noted that Respondent could have simply been charged with practicing public accountancy through an unlicensed corporation in violation of Section 473.309, 473.3101 and 473.323(1)(a), F.S. Notwithstanding this fact, since the ultimate issue in this cause must be whether nor not Respondent is indeed practicing public accountancy by offering accounting services and using accounting skills while trading on the fact of her licensure as a CPA in without complying with the provisions of Section 473 and the rules promulgated thereto, and thus deceiving or misleading the public, it is appropriate to approach these alleged violations in the context of deceptive or misleading advertising.

and Section 473.323(1)(f), F.S. by engaging in deceptive, false and misleading advertising.

In order to analyze whether the Board's interpretation of its statute and rules is constitutional, one must turn to the Supreme Court's test for regulations on protected commercial free speech, set forth in *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), as follows:

> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

It is obvious that the use of a professional license appellation such as "CPA" is a form of commercial speech which, in the case of a CPA who holds an active individual license, is not illegal or inherently misleading. Thus, the statutes which limit the use of "CPA" licensure designation do impact First Amendment rights and satisfy the first prong of the *Central Hudson* test.

The second prong is satisfied, since it is obvious that the regulation of the practice of public accountancy is a valid governmental interest, indeed a vital one, see

United States v. Arthur Young & Co., 465 U.S. 805, 817-821, 104 S.Ct. 1495, 1503-1504, 79 L.Ed.2d 826 (1984), *Mercer v. Hemmings*, 170 So.2d 33 (Fla. 1964).

The rules and statutes in question satisfy the third prong of furthering the abovementioned governmental interest through making sure that only an individual who meets certain standards is permitted to call oneself a CPA. Included in those standards is the requirement that if an individual provides accounting services to the public while trading on the fact of his/her licensure, one must subject oneself to the statutes and rules governing the practice of public accountancy in the state. Needless to say, the use of the term "CPA" by an individual providing accounting skills and services to the public, while that individual at the same time asserts that one is not subject to the regulations of the statutory body created to regulate certified public accountants, would not further the purpose for CPA licensure set forth in Section 473.301, F.S.

Finally, the statutes and regulations in question, which simply require that individuals, who trade on the fact of their licensure as CPAs while offering accounting skills and services to the public, must comport with the rules and regulations governing the practice of public accounting, is a "reasonable fit" between the public good, i.e., and knowledge that any individual trading on the fact they are CPA, will be regulated by the public and agency in question, and the limitation on individual licensee's rights to call oneself a CPA while not complying with the requirements of the statute. *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034 106 L.Ed.2d 388 (1989). Since the

statutes and regulations only apply to those individuals who are engaged in offering accounting services to the public, as opposed to those who are in government or providing services only to their employer, it is appropriate that individuals should not be permitted to append the term "CPA" after their name, even though they hold an active license, if they are providing accounting services and skills to the public, but are not in compliance with all provisions of Chapter 473.[8]

The Hearing Officer's ruling that Respondent's advertising that she is a CPA in the telephone directory and in her business communications, can be remedied by verbal and visual disclaimers is in error. In essence, Respondent advertises the fact that she is a CPA to the general public, and performs identical or similar services

---

[8] The Hearing Officer apparently placed great weight upon the fact that the CPA certificate states that the recipient "has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant." See Proposed Finding of Fact No. 4, and Proposed Conclusion of Law No. 15. The certificate is, of course, only evidence of a license. It is difficult to conceive, when construing the above mentioned terms on the CPA's certificate, that an individual is entitled to advertise the fact of licensure if that individual was not in compliance with all provisions of Chapter 473, and Chapter 21A, F.A.C. To do otherwise, would be to permit an individual to use the title "Certified Public Accountant" when advertising and providing accounting skills and services to the public, but not to be subject to those statutes and rules, which were specifically enacted to secure the integrity and objectivity of CPAs when providing such services.

to those which Respondent admits she performed in licensed CPA firms. Respondent and the Hearing Officer, however, apparently believe that since Respondent could verbally tell potential clients that she was not practicing public accounting, that the clients would have no reasonable expectation that Respondent would be subject to the rules and regulations of the Board of Accountancy. Potential clients, however, would clearly see Respondents [sic] use of the title "CPA" in her advertisements as an inducement to contact Respondent and seek her services thinking that she was a licensee subject to the rules of the Board of Accountancy. Since Respondent uses her accounting skills in then providing services to clients, it is illogical to believe that any disclaimer would disabuse a client of believing that Respondent's failure to meet adequate standards of professional competence would not result in disciplinary action by the very agency which granted her the license which she trades upon. It is axiomatic that the improper use of a Title when providing the services described by the Title by an individual either not licensed under the act, or unwilling to comply with various provisions of the statute and rules, when holding a license, is inherently misleading and may be prohibited. See *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 605-606 (4th Cir. 1988). Since Chapter 473 and the rules promulgated thereto place reasonable conditions upon CPAs who wish to trade upon the fact of licensure in connection with using accounting skills and providing accounting services to the public, it is apparent that the Board's position that a CPA must comply with the statutes and rules when trading upon the fact of licensure as

a CPA, constitutes a "reasonable fit" for constitutional purposes.[9]

II

The Hearing Officer also found that the use of the term "CFP" (standing for Certified Financial Planner) by Respondent, in the telephone directory yellow pages, as

---

[9] It is asserted by Respondent that since she is an attorney regulated by the Florida Bar, that the Board of Accountancy's assertion that she must comply with the provision of Chapter 473 and the rules promulgated thereto when she trades on the fact of her licensure as a CPA, and provides accounting services, constitutes the unlawful regulation of the practice of law. This position is erroneous. The mere fact that the Florida Bar permits attorneys to list other professional licenses as part of their credentials, see Rule 4-7.4, Rules of the Florida Bar, does not, and can not limit the responsibility of the dual license-holding attorney of complying with the requirements and rules of the other profession. It is obvious, for example, that any attorney who happens also to be a real estate broker, and who sells real estate in his law practice, can and will be subject to the Florida Real Estate Commission, for any violations of Chapter 475, and the rules promulgated thereto when he is selling real estate. This does not mean that the attorney will not also be subject to the rules of the Florida Bar, if, in the same real estate transaction, the attorney gave an erroneous title opinion. Dual license holding can and should subject the license holder to dual responsibility to the regulatory agencies having jurisdiction over the licensee. It is up to the licensee to resolve conflicts between the rules and statutes of the regulatory bodies, either by modifying the licensee's practice, so as to comport appropriately with all regulatory bodies, whose profession is being practiced by the licensee, or to cease leading the public to believe that the licensee complies with all regulatory requirements by trading on a license, when the license will not adhere to the strictures of that profession.

well as on her business card and letterhead, was not a violation of Rule 21A-24.001, F.A.C., and Section 473.323(1)(f), F.S.

Rule 21A-24.001(1)(g)-(j) and (2) states as follows:

> (1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:
> (g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice or public accountancy unless he has in fact received such recognition and such recognizing agency is approved by the Board. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy the advertisement must state that the use of the term is self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or
>
> (h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," or "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of the Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or directly, [sic] of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead.

Insofar as the Board has found above that Respondent is practicing public accounting, it is obvious, as a matter of law, that her advertisements in the yellow pages, business cards and letterhead of the fact that she is

a Certified Financial Planner through the use of the initials "CFP", are violations of Rule 21A-24.001 as set forth above, and therefore, Section 473.323(1)(f), F.S.

Paragraph 25 of the Hearing Officer's Conclusions of Law, wherein she tasks the Board of Accountancy for not "proving up any rationale" for it's [sic] *rule* relating to the use of the term "certified" is outside the purview of the instant Section 120.57(1) proceeding. A Hearing Officer of the Division of Administrative Hearings, when faced with a promulgated rule, must apply that rule to the facts set before her. It is not necessary for the agency to prove up the rationale for the rule in every Section 120.57(1), F.S. hearing relating to the application of that rule before the Division of Administrative Hearings.

Notwithstanding the foregoing, the rationale for the Board's prohibition of the publication of credentials using terms such as "certified" by CPAs practicing public accounting when those designations have not been approved by the Board of Accountancy as specialties in the practice of public lexicon, "certified", when used in conjunction with public accountancy, means state licensure or approval. See *Peel v. Attorney Registration and Disciplinary Commission*, ___ U.S. ___, 110 S.Ct. 2294-95, (1990), (Marshall, J. concurring). It is the Board's position that the use, by a CPA, of any of the terms set forth in Rule 21A-24.001(1)(i), when those terms have not been approved by the Board is inherently misleading.

In balancing the public's right to know of attainments of CPAs in addition to their license as a CPA, it is the Board's position that the use of terms set forth in Rule 21A-24.001(1)(i), in conjunction with the term "CPA" and

the practice of public accounting, are so close to the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead the public into believing that state approval and recognition exists. The terms prohibited by Rule 21A-24.001(1)(i), thus can only be used in conjunction with the term "CPA" when the Board has, in fact, approved a form of recognition or self designation using such terms as a Board approved speciality. It is to be noted that the Board has the authority to approve the use of such speciality designation by CPAs, however, no request has ever been made for approval either by Respondent or by the parent organization which awarded her the certificate as a Certified Financial Planner, cf. *Accountant's Society of Virginia v. Bowman, supra.*

As such therefore, it is apparent that Respondent has advertised the fact that she is a CFP or Certified Financial Planner, which, in the context of an individual practicing public accounting and trading on the fact that she is a certified public accountant, has been determined by the Board to be false, deceptive and misleading advertising by implying a speciality of public accountancy, not recognized by the Board of Accountancy.

CONCLUSION

Based upon the foregoing, Respondent is hereby found to be in violation of Section 473.323(1)(a), (f), (g), (h) and Rule 21A-24.001, F.A.C., and is hereby disciplined as follows:

Respondent is hereby REPRIMANDED with the imposition of the reprimand being stayed until any appellate proceedings in this cause are completed.

DONE and ORDERED this 23rd day of April, 1992, by the Florida Board of Accountancy.

/s/ Beryl H. Davis,
BERYL H. DAVIS,
CHAIRMAN

CC: Counsel of Record

wp/Ibanez(S)

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY, Petitioner, vs. SILVIA IBANEZ, Respondent.	)	CASE NO. 91-4100

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on August 27, 1991, in Tallahassee, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

FOR RESPONDENT:
Tobi C. Pam, Esquire
Department of Professional Regulation
Suite 60
1940 North Monroe Street
Tallahassee, FL 32399-0792

FOR RESPONDENT SILVIA S. IBANEZ:
Silvia S. Ibanez, Esquire
Post Office Drawer 7667
Winter Haven, FL 33883
and
Michael P. Sampson, Esquire
Holland & Knight
Post Office Box 32092
Lakeland, FL 33802-2092

STATEMENT OF THE ISSUES

(1) Count I of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges Respondent Certified Public Accountant (CPA) practiced public accounting in an unlicensed firm by appending the CPA designation after her name in the telephone book and on business cards in violation of Sections 473.323(1)(a), (g), and (h) *F.S.* and Rule 21A-20.012 *F.A.C.*

(2) Count II of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges that Respondent CPA violated Sections 473.323(1), (g), and (h) and Rule 21A-24.001(1)(g) *F.A.C.* by appending the certified financial planner (CFP) designation along with the CPA designation after her name in the telephone book and on business cards, in that the CFP designation allegedly is an unapproved specialty of accountancy.

(3) Count III of the Amended Administrative Complaint as modified by the August 22, 1991 Order on Reconsideration alleges that Respondent CPA practiced public accounting by holding herself out as a CPA by appending the CPA designation after her name in the telephone book and on her business cards, implying that she abides by the provisions of Chapter 473 *F.S*, and is thereby in violation of Sections 473.323(1)(f), (g), and (h) *F.S.* and Rule 21A-24.001 *F.A.C.* [no specific subsections cited].

PRELIMINARY STATEMENT

Silvia S. Ibanez (Ibanez) filed a petition on May 10, 1991 challenging the validity of Rule 21A-20.012 *F.A.C.*, one of the rules upon which this instant disciplinary action by the Department of Professional Regulation (DPR) against Respondent Ibanez is based. That case was styled *Ibanez et al. v. Board of Accountancy et al.*, DOAH Case No. 91-3336R. On June 13, 1991, DPR filed this instant disciplinary action against Ibanez. The initial administrative complaint was triggered by anonymous notification to DPR of the contents of Ibanez' telephone listings and business card. The two cases were consolidated.

DPR filed an amended administrative complaint on July 30, 1991, which amendments were opposed by motion. In consideration of those motions, the amended administrative complaint was modified by the Order of Reconsideration entered August 22, 1991.

After bifurcation and formal hearing in the rule challenge, the instant disciplinary case was heard in formal hearing on August 27, 1991.

DPR had three exhibits admitted in evidence and presented the oral testimony of Louis Dooner, Elise Rice, and Martha Willis.

Ibanez had admitted twelve exhibits and presented the oral testimony of Robert Goss. Respondent Ibanez also testified on her own behalf.

A transcript was provided.

The parties also stipulated that the testimony and exhibits from the rule challenge, *Ibanez et al. v. Board of*

Accountancy et al., DOAH Case No. 91-3336R, would be copied, certified, and adopted into the record of the instant case. That has been accomplished.

All timely filed proposed findings of fact have been considered and ruled on in the appendix to this recommended order, pursuant to Section 120.59(2) *F.S.*

This recommended order relates solely to the instant disciplinary action.

FINDINGS OF FACT

1. Respondent Silvia S. Ibanez is a practicing attorney, a member of the Florida Bar, and holds active Florida CPA License No. 10842, currently in good standing. She is also a Registered Investment Advisor with the Florida Division of Securities and a certified financial planner (CFP). At all times material, she has been actively certified as a CFP in good standing with the International Board of Standards and Practice for Certified Financial Planners (IBCFP).

2. The IBCFP is a corporation. "CFP" and "certified financial planner" are registered trademarks. The IBCFP has no governmental affiliations within the state of Florida. The Florida Board of Accountancy has no involvement in the CFP accrediting process and no proprietary interest over the CFP mark.

3. As a licensee with the federal Securities and Exchange Commission, Ibanez is required to, and does, disclose the fact that she is a CPA.

4. Ibanez' CPA certificate (like all Florida CPA certificates) authorizes her to display her CPA credentials. The CPA certificate represents that the recipient,

> . . . has passed all examinations and has met all other requirements prescribed by law and by rule of this board for certification as an expert public accountant, and *is therefore entitled to append the letters CPA after this registrant's name to evidence registration by this board as a Certified Public Accountant.* [*Emphasis supplied*]

5. The Board of Accountancy's only classifications of CPA licenses/licensees are "active" or "inactive." "Active" and "inactive" refer to the status of the CPA license and do not refer to or imply that the licensee is actively practicing public accounting. One can be an actively licensed CPA and not be practicing public accounting.

6. The Board of Accountancy issued a letter opinion to Ibanez that a CPA who offers financial planning services for a fee but who does not hold out as a CPA or become associated with financial statements would not be practicing public accounting.

7. Ibanez is listed in the yellow pages under the heading, "Attorneys," as "Ibanez, Silvia, S., CPA, CFP." Respondent also is listed in the white pages as "Ibanez, Silvia S., CPA CFP atty." On their face, there is nothing false or fraudulent about these listings. As an attorney, Petitioner also places "CPA" after her name on her business cards and on her letterhead. The Respondent's business card states "Sylvia [sic] Safille Ibanez, JD, CPA, CFP." DPR contends that *because* Petitioner "holds out" to the public as a CPA, uses accounting skills, and provides

one or more types of management, advisory or consulting services, she is currently "practicing public accounting."

8. Ibanez is not listed in the yellow pages under "accountants," "accountants, certified," or "CPAs."

9. Neither the CFP nor CPA credential is part of the firm name, "Silvia S. Ibanez, P.A. – Law Offices," which also appears on Ibanez' business card. Ibanez' telephone directory listings and card at issue show the CPA and CFP credentials strictly appended to Respondent's individual name.

10. Louis Dooner, accepted as an expert certified public accountant, testified that the Respondent is involved in the practice of public accounting because by merely appending the CPA designation after her name on her business cards, she is telling the public that she is offering to perform services that CPAs perform.

11. Respondent Ibanez currently operates as a sole practitioner of law employed by the law firm of "Silvia S. Ibanez, P.A." As such, she provides specialized legal services for her clients not provided by CPAs. As part of her current, normal professional activities as an attorney, she provides all types of tax services to her clients, including tax opinion work, representation before the Internal Revenue Service, and evaluation of the tax consequences of certain transactions. She also performs financial counselling and planning for her clients. In doing so, she utilizes both her legal education, training, and experience and her education, training, and experience as a CPA. Prior to admission to the Florida Bar, Ibanez was employed by two CPA firms where she did substantially similar work, plus audits.

12. It is conceded by the parties that it is possible to practice law and public accounting in the same business activity and that many activities conducted by professionals and nonprofessionals other than by CPAs and other than by attorneys are identical to activities performed by CPAs engaged in public accounting. For instance, anyone can legally prepare a tax return. Bookkeepers and free-lance tax assistors of all sorts are unregulated in any way.

13. Truthful use, communication, or disclosure of the CPA credential by an actively licensed CPA does not *per se* constitute false, misleading, or deceptive advertising. The evidence does not support a finding that withholding truthful disclosure that one has earned the CPA credential benefits the public welfare or effects the purposes of the enabling legislation, or indeed, how such nondisclosure could promote them, particularly since it has been shown that persons of considerably lesser competency and achievement levels in the discipline of accounting may legally offer to the public almost all the services provided by CPAs.

14. The use of the term "CPA" implies a specific competency to the public. The fact that Ibanez is a CPA is valuable to her legal clients. CPA status is a valuable property right to each CPA, and the ability of a practicing attorney to publicize the fact that s/he holds an active CPA license is a valuable asset to that individual.

15. The only activity among public accounting activities that is a unique activity of CPAs is the "attest" function. See, Section 473.322(1)(c) *F.S.* There is no evidence that Respondent Ibanez attests as a CPA in the

course of her law practice or that she personally performs audits.

16. Ibanez testified credibly that her intent in appending the CPA and CFP credentials solely to her own name is to indicate that she is, in her own right, individually licensed as a CPA and CFP.

17. Respondent Ibanez has clearly marked her office premises with all the indicia of a law office, including two signs posted outside the building itself. One sign specifies that the building constitutes "law offices," that "Silvia S. Ibanez, P.A." is located there, and that Ibanez is an "attorney at law," with no reference to her CPA or CFP credentials. Another sign specifies, "law offices," without any reference to her CPA or CFP credentials. A potential client must pass these two signs just to enter the building that houses Ibanez' law office. Once in the building, a potential client also must be admitted by a secretary to Ibanez' inner office.

18. Ibanez has consistently required her secretary to screen all telephone calls and potential clients who enter the office to be certain that persons seeking out Ibanez will be fully informed that Ibanez is not offering strictly accounting services and that she is practicing law. Ibanez also personally makes that information clear to individuals at each initial office consultation and consistently follows up office consultations at which her legal employment has been negotiated with letters and/or employment contracts which set forth the parameters of the legal services she has agreed to perform for clients.

19. Elise Rice is an employee of Petitioner Department of Professional Regulation who has earned a vocational school accounting diploma. She is not a CPA, nor is she an attorney. Ms. Rice testified that she, personally, drew the conclusion from looking at Respondent's business card that the Respondent was a CPA, but that she did not know what CFP or JD signified and therefore she would not assume from the card that Ibanez was a lawyer or a certified financial planner. Clearly, the designation "CFP" did not suggest to Ms. Rice that Ibanez was advertising either a specialty or particular competence in public accounting.

20. Ms. Rice further stated that, despite Ibanez' business card's clear use of the term "law offices," she would continue to believe that Ibanez was doing both CPA work and legal work of "law offices." Ms. Rice further stated that even if she telephoned ahead and spoke to a secretary who clearly indicated that Ibanez was a CPA but was working as a lawyer, she would persist in believing that Ibanez was doing both CPA work and legal work out of "law offices." Ms. Rice also testified that if she arrived at Ibanez' office building and was confronted by the sign posted there which clearly indicates Ibanez is an attorney at law and the two signs that clearly state that the building houses only "law offices," she would then believe that she had come to the wrong place to find Ibanez the CPA. However, Ms. Rice conceded that, under the latter circumstances, the premises were, indeed, law offices. Ms. Rice's personal view that Ibanez must be acting as a CPA in the face of significant information to the contrary is not persuasive that the average layman would be misled by Ibanez' business

card and telephone listings in the face of all her other disclosures.

21. One who has initially consulted the yellow pages of the telephone directory under the heading "attorneys" would most logically infer from Ibanez' yellow pages listing that Ibanez is a practicing attorney who is dually licensed as a CPA and who possesses a CPA's education, training, experience, and skills and that Ibanez is offering to act as a lawyer capable of applying her additional education, training, experience, and skills as a CPA and CFP.

22. The inferences that the average viewer might draw from Ibanez' white pages telephone listing and her business card are more blurred, but Ibanez demonstrated, and it is conceded by both parties, that an individual may have the opportunity to disabuse members of the public that s/he is engaged in the activity of the practice of public accounting or that s/he is offering all the services normally associated with a CPA, as opposed to law or some other profession, at least where there is direct contact by letter or telephone.

23. It may be reasonable that at least until making direct contact with Ibanez or her office staff, the average viewer of either the telephone listings or the card would assume that, as a CPA, Ibanez is subject to disciplinary oversight by the licensing authority for accounting functions only and that she abides by all Board of Accountancy regulations while doing accounting. However, prior to any meaningful employment, Ibanez exercises reasonable care to disabuse the average viewer of that belief.

24. Since 1982, the Board has consistently issued letter opinions on an individual basis to the effect that the designation "certified financial planner" is an accountancy specialization which has not been approved by the Board and further holding that "CFP" could not be displayed by CPA licensees on stationery or in yellow pages listings in conjunction with the CPA designation. The Executive Director of the Florida Board of Accountancy did not know how "certified financial planner" came to be viewed as a specialty designation of certified public accounting, and the letter opinions do not set forth the Board's rationale for considering it as a specialty. The Board has adopted no rule to that effect. Further, in this proceeding, the agency has not proven any rationale for the policy set forth in the Board opinions.

25. The agency presented no evidence by way of anecdotal experience, professional studies, or accumulated data to show that licensed CPAs or certified CFPs have ever mislead [sic] members of the public purely by displaying their credentials in the manner Ibanez has done here.

26. DPR knows of no complaint and has never received any complaint from a member of the public regarding Ibanez' professional activities or advertising. Nor is there any evidence that any member of the public has ever been confused about whether or not Ibanez was practicing accounting or law or financial planning or that any member of the public was mislead into hiring Ibanez under the impression that she would be acting as a CPA solely and not as an attorney, or that she would be performing audits or performing the attesting function of a CPA.

27. Upon the scenario established in the case *sub judice*, Ibanez is not guilty of any fraudulent advertising so as to mislead the public to the effect that she abides by all regulations of the Board of Accountancy.

CONCLUSION OF LAW

1. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. See, Section 120.57(1) *F.S.*

2. Respondent is charged in the three-count amended administrative complaint with several violations of Sections 473.323(1)(a), (f), (g), and (h) and of Rules 21A-20.012 and 21A-24.001 *F.A.C.* solely because she is alleged to be "practicing public accounting or accountancy." The counts overlap in some respects as discussed *infra*.

3. Section 473.302(4) *F.S.* provides, in pertinent part:

> (4) "Practice of," "practicing public accountancy," or "public accounting accounting" means:
>
> (a) Offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory consulting services, by a certified public accountant, or firm of certified public accountants, of this state, including the performance of such services in the employ of another person; or
>
> (b) Offering to perform or performing for the public one or more types of services involving the use of accounting skills or one or more types of management advisory or consulting

services, by any other person holding himself or itself out as a certified public accountant or firm of certified public accountants, including the performance of such services by a certified public accountant in the employ of a person so holding himself or itself out.

However, these terms shall not include services provided by the American Institute of Certified Public Accountants or the Florida Institute of Certified Public Accountants, or any full service association of certified public accounting firms whose plans of administration have been approved by the board, to their members or services performed by these entities in reviewing the services provided to the public by members of these entities.

4. Section 473.323(1) *F.S.* provides, in pertinent part:

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provisions of s. 473.317, s. 455.227(1), or any other provisions of this act;

* * *

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or chapter 455;

* * *

5. Rule 21A-20.011 *F.A.C.* defines "practice of," or "practicing public accountancy" as follows:

21A-20.011 Practice of, or Practicing Public Accountancy

"Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:

(1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or

(2) Activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or

(3) Activities of licensees who do not hold themselves out as certified public accountants.

6. Rule 21A-20.012 *F.A.C.* attempted to define "holding out," as follows:

21A-20.012 Holding Out

"Holding himself or itself out" as used in F.S. 473.302(4) is defined as publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, in such manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA certificate and license issued by the

> Department of Professional Regulation shall not constitute holding out under the terms of this rule. All other publication of the fact that a licensee is a CPA constitutes holding oneself out.

However, Rule 21A-20.012 *F.A.C.* has been ruled invalid in a Final order entered simultaneously herewith in *Ibanez et al. v. DPR, Board of Accountancy,* DOAH Case No. 91-3336R.

7. Rule 21A-24.001 *F.A.C.* is a rule of many subparts defining and precluding certain forms of advertising by CPAs.

8. In their prehearing stipulation, the parties stipulated, as fact, that the Board of Accountancy will not deem Ibanez' activities, including those of an accounting nature, to be public accounting activities if any of the three exclusions under Rule 21A-20.011 *F.A.C.* apply. This stipulation is more in the nature of a stipulation of law than one of fact and has been treated as such. The parties also stipulated as matters of law that the exclusion in Section (3) of Rule 21A-20.011 *F.A.C.* is wholly dependent on the definition of "holding out" and that the credential "CFP" is not a "self-designation" as used in Rule 21A-24.001(1)(g) *F.A.C.*

9. DPR asserted that Ibanez is engaged in "practicing public accounting" as set forth in one or both of the definitions of that term contained in subparagraphs (a) and (b) of Section 473.302(4) *F.S.* Ibanez countered to the effect that she was exempt from those statutory definitions on the basis of one or more of three exclusions to

the term "public accounting," which are set forth in Sections (1), (2), and (3) of Rule 21A-20.011 *F.A.C.*, and therefore, she could not be held to have violated any portion of Chapter 473 *F.S.* More specifically, Ibanez urged that because she is working as an attorney within a P.A. (which she asserted is an employer not required to be licensed under Chapter 473 *F.S.*), she falls under exception 21A-20.011(1) *F.A.C.*

10. First, Rule 21A-20.011 *F.A.C.* cannot be fairly interpreted or legally construed as a blanket exemption from the applicability of *all* Chapter 473 *F.S.* provisions. Minimally, Ibanez remains subject to the Chapter's payment of fees, continuing education, and good moral character requirements. Secondly, Ibanez' argument with regard to Section (1) of that rule is not persuasive, since she renders personalized services in her own right directly to the public, regardless of certain liability and tax protections afforded her personally by the "P.A." status of her law firm.

11. Whether or not Ibanez comes within the remaining exceptions set forth in Sections 21A-20.011 (2) and (3) *F.A.C.* depends upon how the term "holding out" as used therein is interpreted. The definition of "holding out" is not wholly tied to the invalidated rule, 21A-20.012 *F.A.C.* Absent that rule, interpretation of the statutory term "holding out" is appropriate. Normally, the clear common meaning of the statutory term would be applied. Unfortunately, in this proceeding, statutory interpretation is still rendered "circular" due to Rule 21A-20.011(2) and (3) *F.A.C.*

12. The definition of "practicing public accounting" contained in Section 473.302(4)(a) *F.S.* encompasses Ibanez, who is a CPA licensee. That definition covers "offering to perform or performing for the public one or more types of services involving the use of accounting skills, or one or more types of management advisory consulting services, *by a certified public accountant, . . .* " regardless of whether or not the CPA "holds out." [Emphasis supplied] However, Sections (2) and (3) of Rule 21A-20.011 *F.A.C.* address Section (a) as well as (b) of 473.302(4) *F.S.* The rule provides that, " *'Practice of, practicing public accountancy' as defined by Section 473.302(4) F.S. shall exclude* any of the following . . . (2) activities of licensees who do not hold themselves out as CPAs and who are not associated with financial statements, or (3) activities of licensees who do not hold themselves out as certified public accountants." [Emphasis supplied] It is fairly debatable whether Rule 21A-20.011(2) and (3) *F.A.C.* legitimately interpret the legislative intent of Section 473.302 (4)(a).[1] It is also fairly debatable whether or not Rule 21A-20.011 *F.A.C.* exceeds the Board's statutory mandate and insinuates the Board's discipline into other professions. However, no petition to determine the validity of Rule 21A-20.011 *F.A.C.* has been filed. Therefore, Rule 21A-20.011 *F.A.C.* continues to be entitled to the great weight normally afforded existing agency rules.

---

[1] It seems abundantly clear that absent the exceptions of Rule 21A-20.011 *F.A.C.*, Section 473.302(4)(a) *F.S.* would render actively licensed CPA Ibanez subject to Board discipline whether she "holds out" or not, and it is only section 473.302(4)(b) which includes the term "holding out."

13. Great weight must be afforded to the agency's interpretation of the statutes it administers. It is recognized that DPR and the Board have consistently declined to prosecute any CPA offering all the services Ibanez does unless that CPA was also "holding out" in some manner. It is further recognized that in the instant case, DPR has stipulated that if any of the three exemptions in Rule 21A-20.011 *F.A.C.* applies, then Ibanez' activities, including those of an accounting nature, do not constitute public accounting activities. Applying the three foregoing principles, it ultimately must be concluded that Ibanez' activities, even though she is a licensed CPA, do not constitute "practicing public accounting" *unless* she is one of those "holding themselves out as certified public accountants."

14. Ibanez interprets financial statements, but she is not "associated" with them in the sense that term is normally applied to CPAs. She is not attesting or performing audits. She is not performing any activity that *requires* licensure by the Board of Accountancy. The Board admittedly could not discipline a non-CPA for performing the accounting activities Ibanez is performing.[2] Some of the activities Ibanez performs are the same as activities performed by CPAs. Many are not. As an attorney, she also performs specialized services for her clients that are

---

[2] Section 473.322(1)(c) *F.S*, which reserves the "attest" function strictly to CPAs, also specifies that, "This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

not performed by other CPAs. Her telephone listings and business card do not "hold out" that she will perform any activity exclusive to public accounting or that she will perform work *as* a CPA. All indicia of her office premises, all of her disclaimers, and the majority of actual activities she performs support a conclusion that she is not "holding herself out as a certified public accountant." It is therefore concluded that she is not "holding herself out as a certified public accountant" practicing public accountancy so as to be subject to discipline for the violations charged in the instant amended administrative complaint. Nor is she guilty of any fraudulent advertising so as to mislead the public to the effect that she abides by all the regulations of the Board of Accountancy. Moreover, if the purpose of the police power here exercised is to protect the public, it is difficult to see how the public is harmed by Ibanez' advertising or services, which services she provides only after reasonable – indeed elaborate – efforts at avoiding any misapprehension of her CPA status by those employing her.

15. In making the determination that Ibanez is not "holding herself out as a CPA," the undersigned has weighed both the permissions granted to the Respondent by the Board of Accountancy in its certificate of licensure and the permissions granted to the Respondent by the Legislature under Section 473.322 *F.S.*[3] The undersigned

---

[3] Section 473.322 *F.S.* permits a CPA to assume and use his or her validly earned credential and title and to put it in words, letters, abbreviations, signs, cards and devices so long as s/he is actively licensed. The credential provides much the same. See, Finding of Fact 4, *supra*.

also has considered the thrust of the opinions in *Cenac v. Florida State Board of Accountancy*, 399 So. 2d 1013 (Fla. 1st DCA 1981) and *Florida Accountants Assoc. v. Dandelake*, 98 So. 2d 323 (Fla. 1957). *Dandelake* considered the occupational rights of accountants who are not certified *viz a viz* the Board's regulatory powers. *Cenac* considered the situation of an inactively licensed CPA performing many but not all the services normally considered "practicing public accountancy."

16. Although this is a case of first impression with regard to an actively licensed CPA and those cases were decided with regard to different predecessor statutes and absent any similar rule in place, they provide direction. Those cases are persuasive (1) that a balanced weighing of all indicia of the "practice of public accounting" is to be done when determining whether or not a practitioner is "holding out as a CPA," (2) that a single indicator of whether or not a practitioner is "holding out" should not outweigh any other indicator, and (3) that the degree of benefit derived by the CPA from use of his or her CPA status must also be balanced against any real or potential harm therefrom to the public.

17. On their face, Ibanez' business card and yellow pages listing may reasonably be considered "advertising." "Advertising" is commonly thought of as constituting "holding out" a person, a product, or a service, but in this case, Ibanez' business card and yellow pages listing go no further than conveying to the public passive, but valuable, biographical information which every actively licensed CPA is entitled to assume, use, and append to his name in a variety of ways. The record is utterly

devoid of any evidence that Ibanez has mislead the public into believing she would perform all the functions of a CPA. The fact that her listing in the yellow pages is under the heading "attorneys" and is not associated with accountancy headings is especially significant in this regard, as is the care with which she has labelled her law office and instructed her staff. No dishonesty or misleading activity has been shown in this case, except to the extent that advertisement of her CPA status initially inaccurately suggests that she is subject to broad disciplinary oversight by the licensing agency. Her subsequent disclaimers as to what she will or will not undertake professionally would seem to "cure" any potential for the public to be mislead by her advertising.

18. In analyzing all indicia of "holding out," disclaimers may be considered. In the recommended order underlying the *Cenac* case, Hearing Officer Ayers considered as significant all disclaimers by the practitioner to his clients that the practitioner was not practicing public accounting or was not offering all of the services normally associated with CPA status. The reviewing court did not disturb the hearing officer's assessment that such disclaimers are significant to determine the issue of "holding out" and the issue of whether there had been actual or potential fraud upon the public.[4]

---

[4] The opportunity and effectiveness for use of disclaimers by professionals so as to not mislead the public has most recently been explored in *Peel v. Attorney Registration and Disciplinary Comm'n*, ___ US ___, 110 S. Ct. 2281, 110 L.Ed. 2d 83 (1990). See, also "Post-Peel Battles", *The National Law Journal*, Vol. 14 No. 17-18 (December 30, 1991 – January 6, 1992).

19. Although DPR urges a more literal and far more restrictive reading of the term "hold themselves out as public accountants," such a highly restrictive interpretation is not appropriate when dealing with commercial free speech. Commercial free speech constitutes expression related exclusively to the economic interests of the speaker and the audience. DPR's concept that merely appending the designation "CPA" after Ibanez' name misleads the public and must be prevented would constitute a speaker specific, unqualified ban on a category of expressive activity without any appropriate limitation based on time, place, or manner. Since this record is devoid of proof that anyone has been mislead by Ibanez, and it is clear her disclosure is valuable to her audience, great care must be taken before applying a highly restrictive interpretation of the statute. Contrary to DPR's urging, where a less restrictive interpretation is available, one should not assume that *any* benefit to the CPA, no matter how small that benefit may be, will be sufficient to concomitantly subject the CPA to discipline absent some demonstrated harm to the public. Consequently, where, as here, no evil to be prevented by the police power has been clearly demonstrated, the balance weighs against finding Ibanez to be "holding out."

20. The concept of balancing the benefit derived by the speaker (a CPA in this case) against the evil sought to be defended against by the police power of the state was only peripherally discussed in *Cenac*, but that balancing test for interpreting statutes has since been echoed and refined in other cases involving commercial free speech. See, *Central Hudson Gas v. Public Service Commission*, 447 US 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) and *Florida*

Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). The potential for harm to the public must be recognizable and must clearly outweigh any anticompetitive impact, and other, less restrictive means of regulating the licensee must not be available. Blanket prohibitions on commercial speech are disfavored in the law. Any restriction on commercial speech requires the government goal to be substantial and the cost to be carefully calculated. There must be a "reasonable fit" between the statute's ends and the means chosen to accomplish those ends. Government may ban commercial speech that is more likely to deceive the public than to inform it or commercial speech that is related to illegal activity. However, in most other contexts, the First Amendment prohibits regulation based on the content of the speech, provided the content is basically truthful. Where the information is presented in a way that is not deceptive it should be permitted even though potentially misleading. See, *Fane v. Edenfield*, Case No. 90-3943 U.S. Ct of Appeals, 11th Circuit, 945 F. 2d 1514 (October 30, 1991), specifically ruling that Chapter 473 *F.S.* "must be narrowly tailored to achieve its anticipated objectives." See also, *Bd. of Trustees of State University of New York v. Fox*, 492 US 469, 109 S.Ct. 3028, 106 L. Ed. 2d 388 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 US 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475; *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 US 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986); *In re R.M.J.*, 455 US 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); and *Consolidated Edison Co. of N.Y., Inc. v. Public Service Cmm'n*, 447 So. 2d 530, 100 S.Ct. 2326, 65 L. Ed. 2d 319 (1980). If this statutory and regulatory scheme were interpreted as DPR requests, it could be determined to be unconstitutional.

Courts have a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with constitutional provisions. See, *Industrial Fire & Casualty Ins. Co. v. Kwechin*, 447 So. 2d 1337 (Fla. 1983); *State v. Gale Distributors, Inc.*, 349 So. 2d 150 (Fla. 1977); *Marsh v. Garwood*, 65 So. 2d 15 (Fla. 1953). Accordingly, a construction of the statutory term "holding out" in consonance with the rationale in *Cenac* and *Dandelake* that the public is only harmed if substantially misled avoids any potential constitutional conflict in interpreting the provisions of Chapter 473 *F.S.* What is important in Ibanez' case is that, although she is an actively licensed CPA, she has induced no unwarned reliance on her CPA certification. She has made full disclosure with disclaimers appropriate to the situation.

21. The foregoing conclusion that Respondent Ibanez is not "holding herself out as a CPA" so as to be subject to license revocation, suspension, or other discipline by the Board resolves in her favor all issues raised in all three counts of the Amended Administrative Complaint. However, that pleading is somewhat less than clear, so some further commentary as to the specific charges may be in order.

22. Count I of the Amended Administrative Complaint originally contained allegations under Sections 473.309 and 473.3101 *F.S.* that Ibanez' law firm should have been licensed and was unlicensed as a certified public accounting firm. That allegation was withdrawn by Petitioner as reflected in the August 22, 1991 Order on Reconsideration. Consequently, Count I of the Amended Administrative Complaint herein only charged Ibanez

pursuant to Sections 473.323(1)(a) *F.S.* [violation of Sections 473.317 and 455.227(1) or any other provisions of Chapter 473 *F.S.*], Sections 473.323(1)(g) *F.S.* [fraud or deceit, or of negligence, incompetency or misconduct *in the practice of public accounting*] and 473.323(1)(h) *F.S.* [violation of any rule adopted pursuant to chapters 473 or 455], and Rule 21A-20.012 *F.A.C.*, now determined to be invalid. [Emphasis supplied]

23. Section 473.317 *F.S.* involves competitive negotiation wherein the licensee will attest as an expert in accountancy. Section 455.227(1) *F.S.*, is a professional disciplinary "catchall." The Amended Administrative Complaint herein alleges no specific acts constituting competitive negotiation and no factual evidence to that effect was introduced at formal hearing. The evidence is clear that Ibanez does not perform the "attest" function unique to CPAs which is an integral part of Section 473.317 *F.S.* DPR's proposed recommended order does not even argue those issues. Due to DPR's withdrawal of the charges in Count I specifically citing Sections 473.309 and 473.3101 *F.S.*, as recognized in the Order on Reconsideration, it must be concluded that Ibanez could not be held in this proceeding to have violated those statutory provisions which were withdrawn. Therefore, even *if* Ibanez were practicing public accounting and was therefore subject to the Board, those charges alleged under Count I were not established in this case.

24. Under Count II, Ibanez was also charged with violating Sections 473.323(1)(g) [fraud or deceit, or of negligence, incompetency, or misconduct, *in the practice of public accounting*] and (h) *F.S.* [violation of any rule adopted pursuant to Chapters 473 or 455 *F.S.*] and Rule

21A-24.001(1)(g) *F.A.C.* Therein, Ibanez was prosecuted for her use of the CFP designation as a specialty designation on her business cards and in her yellow pages listing. In Count III, Ibanez was prosecuted for using her CPA designation in such a way that it is "misleading," in that she has allegedly represented to the public that she abides by all provisions of Chapter 473 *F.S.* Count III specifically charged Ibanez pursuant to Section 473.323(1)(f) [advertising goods or service sin a manner which is fraudulent, false, or misleading in form or content] and again pursuant to Sections 473.323(1)(g) and (h) *F.S.* and apparently under *all* of the sections of Rule 21A-24.001 *F.A.C.*

25. Assuming, *arguendo*, that Ibanez had been found to be "practicing public accounting" so as to be subject to the advertising rule, she still could not be found guilty of committing any violation thereof alleged under Counts II or III upon the facts in this record. Either because of her active CPA licensure or because Ibanez has, in fact, earned the CPA and CFP credentials or because the rule sections simply do not apply, Ibanez' situation does not fall within Sections (1)(a) through (f) or Section (1)(h) of Rule 21A-24.001 *F.A.C.* With regard to the remaining sections of that rule, (1)(j), (g), and (i), the Board's opinions have declared "CFP" to be an unrecognized specialty of public accounting. The Board also has never recognized the IBCFP. However, the Board has promulgated no rule concerning "CFP" specifically and has failed to prove up any rationale for its policy with regard to "CFP" or "certified financial planner" contained in its letter opinions. Ms. Rice's testimony belied any suggestion that the CFP

designation used with the CPA designation *implies* specialization in public accounting or misleads the public to that effect. Certainly, Ms. Rice did not *infer* that Ibanez' use of the abbreviation "CFP" "held out" a specialty of public accountancy. With further regard to (1)(g) of that rule, it should be recognized that Ibanez has not stated on her cards or in the yellow pages that CFP is an accountancy specialty or that by obtaining that credential, she is a specialist in public accounting, and DPR has stipulated that for purposes of Section 21A-24.001(1)(g), "CFP" is not a "self-designation." Rule 21A-24.001(1)(i) specifies that a CPA may not state a non-Board form of recognition using the word, "certified." "CFP" is a form of recognition by an entity other than the Board, but there is no clear and convincing evidence of a violation of Section 21A-24.001(1)(i) since Ibanez has only implied the word "certified" by using the abbreviation "CFP." There also is no proof her use of "CFP" and/or "CPA" and "CFP" has mislead [sic] anyone.

26. Therefore, even *if* Ibanez were practicing public accounting and were therefore subject to the Board, none of the charges alleged under Counts II or III were established in this case.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Accountancy enter a Final Order that:

(1) Finds Respondent Ibanez is not "holding herself out as a certified public accountant" and

(2) Finds her not guilty of all charges alleged under Counts I through III and dismisses them

DONE and ENTERED this 15th day of January, 1992, at Tallahassee, Florida.

/s/ Ella Jane P. Davis
ELLA JANE P. DAVIS,
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the Division of Administrative Hearings this 15th day of January, 1992.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS: All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party *at least 10 days* in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. *You should consult with the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order.* Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

Copies furnished to:

Michael P. Sampson, Esquire
Holland & Knight
P. O. Box 32092
Lakeland, FL 33802-2092

Silvia S. Ibanez, Esquire
P.O. Drawer 7667
Winter Haven, FL 33883

Tobi C. Pam, Esquire
Department of Professional Regulation
Suite 60
1940 North Monroe Street
Tallahassee, FL 32399-0792

Martha Willis
Executive Director
Board of Accountancy
Suite 16
4001 Northwest 43rd Street
Gainesville, FL 32606

Jack McRay
General Counsel
Department of Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-0792

Courtesy Copies to:

John J. Rimes, III
Assistant Attorney General
Department of Legal Affairs
The Capitol, LL04
Tallahassee, FL 32399-1050

Kenneth R. Hart, Esquire
Stephen C. Emmanuel, Esquire
J. Jeffry Wahlen, Esquire
Ausley, McMullen, McGehee, Carothers & Proctor
P.O. Box 391
Tallahassee, FL 32302

Julie Gallagher, Esquire
Stowell, Anton & Kraemer
P.O. Box 11059
201 South Monroe Street, Suite 200
Tallahassee, FL 32302

Sydney S. Traum, P.A.
Semet, Lickstein, Morgenstern & Berger, P.A.
Twelfth Floor, Ponce De Leon Plaza
201 Alhambra Circle
Coral Gables, FL 33134

Thomas W. McCulloch, Esquire
McCulloch, Ellis & Payne
6671 Southwest Freeway, Suite 800
Houston, TX 77074

Mr. James R. Brewster
2212 Yaupon
Tallahassee, FL 32303

Case No. 91-4100

APPENDIX TO RECOMMENDED ORDER
CASE NO. 91-4100

The following constitute specific rulings pursuant to Section 120.59(2) *F.S.* upon the parties' respective proposed findings of fact (PFOF):

DPR's 39 PFOF:

Accepted except where subordinate, unnecessary, or cumulative to the facts as found. Material which falls in any of those categories has *not* been utilized in the recommended order (RO): 1, 9-11, 13-15, 20, 24, 26, 34-36, 38.

Rejected as stated because *as stated* these PFOF are misleading or constitute unreconciled or isolated record evidence or

constitute or contain a conclusion of law (COL) or constitute mere legal argument, but otherwise the subject matter is covered in the RO: 2-3, 12, 25, 27, 31-33, 37, 39.

Rejected as subordinate, unnecessary, or cumulative or otherwise nondispositive of the material issues once Rule 21A-20.012 is invalidated: 16-19, 21-23, 28, 32.

Rejected as immaterial except to the degree covered in the RO: 4-8.

Accepted in part and rejected in part on issues of credibility; covered in the RO: 29-30

Respondent's 56 PFOF:

Accepted except where subordinate, unnecessary, or cumulative to the facts as found. Material which falls in any of those categories or which is material only to the rules challenge case and not this disciplinary case has *not* been utilized in the recommended order (RO): 1-7, 10, 14, 17, 24, 34-35, 40, 42-46, 48-50, 52-56.

Rejected as stated because *as stated* these PFOF are misleading or constitute unreconciled or isolated record evidence or constitute or contain a conclusion of law (COL) or constitutes mere legal argument, but otherwise the subject matter is covered in the RO: 11-13, 15, 19, 27, 39, 47, 51.

Rejected as subordinate, unnecessary, or cumulative or otherwise nondispositive of the material issues in this disciplinary case: 8-9, 16, 18, 20-23, 25-26, 28-33, 36-38.

Rejected as Immaterial: 41.

♦ Attorneys—(Cont'd)

HILEMAN BYRON P 200 Avenue K SE **299-4883**
(See Advertisement On Page 73)
HOLDEN LANCE 99 6th St SW **299-6699**
Holland & Knight
92 Lake Wire Dr Lakeland 682-1161

HOLMES JEFF

470 W Davidson Bartow **533-8725**
Or 533-8726
24 Hour Hotline 299-5483

Wouldn't your teen-ager love

the convenience of a private

teen line?

WHEELER
&
TRAVISS PA

REAL PROPERTY LAW
CORPORATE & BUSINESS LAW
CIVIL LITIGATION
WILLS & ESTATE PLANNING

JAMES J. TRAVISS
IRVING W. WHEELER
ROBERT E. MURRELL

294-7461

HAVEN FEDERAL BUILDING, SUITE 200
250 2ND ST SW

HOWELL CLIFTON L

A PERSONAL INJURY
LAW FIRM

Howell & Thornhill

SERIOUS INJURY,
DEATH CLAIMS
AUTO • TRUCK
MOTORCYCLE • BOAT
DEFECTIVE PRODUCTS
INSURANCE CLAIMS
- FREE CONSULTATION -

293-3166
688-3166

BOARD CERTIFIED
CIVIL TRIAL LAWYER
OVER 39 YEARS
COMBINED EXPERIENCE

1350 Havendale Blvd **293-3166**

HOWELL & THORNHILL
1350 Havendale Blvd **293-3166**
(See Advertisement On Page 67)
Howell & Thornhill Lakeland 688-3166
Huie Gordon C 24 N 6th St Haines City 422-1914
HUNTER J MICHAEL
Personal Injury
General-Civil Practice
402 Kentucky Av S Lakeland **683-5751**
Hutchinson Jonnie M 150 E Haines Blvd 956-3461
Hutton E Josiah 786 Avenue C SW 294-0602
IBANEZ SILVIA S CPA CFP
Se Habla Espanol
659 Avenue A NW **299-8553**

KEOUGH ROBERT D

Personal Injury & Wrongful Death
Workers Compensation
315 E Robinson Orlando **407 849-6580**
King Jan L Sr 101 Morningside Dr Lakeland .. 683-7491
Knapp Stephen M
5417 Florida Av S Lakeland 644-5555
Kuehner D Brian
4921 Southfork Dr Lakeland 646-5728
Kuhn Phillip E 3500 Florida Av S Lakeland .. 644-1482
Lakeland Legal Center
1809 Richmond Rd Lakeland 688-4466

LANE TROHN CLARKE BERTRAND & WILLIAMS PA

202 E Walnut Lakeland **688-7944**
Langston Scott H
Ofc
107 Florida Av S Lakeland 688-5659
LASSEIGNE TED A
General Practice
95 S 10th St Haines City **422-5978**
Laurent John F PA 650 Davidson E Bartow ... 533-7817
Liguori John
770 Main E Bartow 533-6143
LILLY R KENT
Civil Trial Practice
212 E Stuart Av Lake Wales **676-8584**
Lobb Richard W PA Haines City 421-2424
LOCKWOOD DOUGLAS A III
Civil-Trial Practice
Personal Injury-Wrongful Death
141 5th St NW **294-3360**
Mann John L 215 Lime E Lakeland 683-1358

MARS RICHARD D PA

Board Certified
In Criminal Law
Marital & Family Law
Trial Practice
343 Davidson W Bartow **533-0855**
Martin Joe T
Ofc
416 S 1st St Lake Wales 676-6085

MARTIN & MARTIN

E Snow Martin
E Snow Martin Jr
Michael D Martin
Cecelia M Moore
200 Lake Morton Dr Lakeland **688-7611**
Martin Stephen M
1125 US Hwy 98 S Lakeland 683-8765

SILVIA SAFILLE IBANEZ, JD, CPA, CFP

LAW OFFICES

Silvia S. Ibanez, P. A.

659 AVENUE A, N. W.
WINTER HAVEN, FLORIDA 33881

(813) 299-8550
(813) 299-8553

Silvia S. Ibanez, P.A.

LAW OFFICES

659 AVENUE A, N. W.
WINTER HAVEN, FLORIDA 33881

SILVIA SAFILLE IBANEZ

MEMBER OF:
AMERICAN BAR ASSOCIATION
AMERICAN INSTITUTE OF CPAs
INTERNATIONAL BOARD OF CFPs
FLORIDA BAR ASSOCIATION
FLORIDA INSTITUTE OF CPAs

MAILING ADDRESS:
P. O. DRAWER 7667
WINTER HAVEN, FL 33883-7667
(813) 299-8553
(813) 299-8550

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

473.301 Purpose. The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

History – ss. 1, 25, ch. 79-202; ss. 2, 3, ch. 81-318; ss. 10, 11, ch. 85-9.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.322 Prohibitions; penalties.

(1) No person shall knowingly:

(a) Practice public accounting unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviations "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that such person holds an active license under this act, unless such person holds an active license under this act;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills, including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof for the purpose of obtaining a license;

(f) Use or attempt to use a public accounting license which has been suspended, revoked, or placed on inactive status.

(g) Employ unlicensed persons to practice public accounting; or

(h) Conceal information relative to violations of this act.

(2) Any person who violates any provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083.

History – ss. 20, 25, ch. 79-202; ss. 2, 3, ch. 81-318; ss. 10, 11, ch. 85-9; s. 104, ch. 91-224.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provisions of s. 473.317, s. 455.227(1), or any other provisions of this act;

* * *

473.317 Competitive negotiation.

(1) A licensee shall not make a competitive bid for a professional engagement in which the licensee will attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed.

(2) As used in this section, "competitive bid" means the submission of an offer to a prospective client, as distinguished from an existing client, or representative thereof, by a licensee, either orally or in writing, directly or indirectly, as either a prime contractor, a subcontractor,

or a subcontractor using a prime contractor as a conduit, to perform a professional engagement for an estimated fee, a fixed fee, or a basis of fee when the surrounding facts and circumstances indicate that another licensee will be asked to make an offer, has been asked to make an offer, or has been made an offer which has not been rejected to perform the same professional engagement for an estimated fee, a fixed fee, or basis of fee as defined in this section. The performance of an engagement for a specific purpose, which engagement by its nature is not expected to recur, does not create an "existing client" relationship.

(3) The term "subcontractor" as used in this section means a subcontractor whose actions, together with the surrounding facts and circumstances, are in such a manner as to make him a party to a competitive bid or bids, either with respect to a specific engagement or as a result of a series of engagements with the same prime contractor, without regard to whether a subcontract is entered into before or after the bid.

(4) A licensee may respond to any request from a person or entity for a proposal giving qualifications and other factual information, excluding any quotation as to basis of fee.

(5)(a) If a licensee's proposal in subsection (4) is the only proposal received or accepted by a person or entity, the licensee may negotiate a basis of fee for that engagement. If a person or entity receives more than one proposal for the same engagement, the person or entity may rank, in order of preference, the licensee to perform the engagement. The licensee ranked first may then negotiate

a contract with the person or entity giving, among other things, a basis of fee for that engagement. Should the person or entity be unable to negotiate a satisfactory contract with that licensee, negotiations with that licensee shall be formally terminated, and the person or entity shall then undertake negotiations with the second-ranked licensee. Failing accord with the second-ranked licensee, negotiations shall be terminated and undertaken with the third-ranked licensee. Negotiations with the other ranked licensees shall be undertaken in the same manner. Once negotiations have been undertaken with a subsequent licensee, a licensee shall not contract with the requesting person or entity for the same engagement.

(b) The Legislature or the governing body of a municipality, in negotiating with licensees with respect to an audit engagement, may reopen formal negotiation with any one of the three top-ranked firms.

History – ss. 16, 25, ch. 79-202; ss. 1, 2, ch. 81-194; ss. 2, 3, ch. 81-318; s. 3, ch. 83-265; ss. 10, 11, ch. 85-9; s. 2, ch. 86-102.

Note – Repealed effective October 1, 1995, by s. 11, ch. 85-9, and scheduled for review pursuant to s. 11.61 in advance of that date.

455.227 Grounds for discipline; penalties; enforcement.

(1) The board shall have the power to revoke, suspend, or deny the renewal of the license, or to reprimand, censure, or otherwise discipline a licensee, if the board finds that:

* * *

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

* * *

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

* * *

473.323 Disciplinary proceedings.

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

* * *

(h) Violation of any rule adopted pursuant to this act or chapter 455;

* * *

21A-20.011 Practice of, or Practicing Public Accountancy

"Practice of, or practicing public accountancy" as defined by Section 473.302(4), F.S., shall exclude any of the following:

(1) Services rendered by a licensee as an employee of a governmental unit or an employee rendering accounting services only to his employer as long as that employer is not required to be licensed under F.S. 473, or

(2) Activities of licensees who do not hold themselves out as certified public accountants and who are not associated with financial statements, or

(3) Activities of licensees who do not hold themselves out as certified public accountants.

Specific Authority: 473.302, 473.304, 473.307, F.S. **Law Implemented**: 473.302, F.S. **History**: New 12-4-79, Amended 9-17-84, 1-25-87.

21A-20.012 Holding Out

"Holding himself or itself out" as used in F.S. 473.302(4) is defined as publicizing that the licensee is a certified public accountant when providing, or offering to provide services or products to the public, in such manner that an uninformed person may not be able to differentiate whether or not the licensee may also be in the practice of public accounting. The display of the CPA

certificate and license issued by the Department of Professional Regulation shall not constitute holding out under the terms of this rule. All other publications of the fact that a licensee is a CPA constitutes holding oneself out.

Specific Authority: 473.302,473.304, F.S. **Law Implemented**: 473.302, F.S. **History**: New 9-17-84.

21A-21.009 Other Business Activities

A licensee engaged in the practice of public accounting may concurrently engage in other business, occupation, or profession if:

(1) The licensee does not hold himself out as a certified public accountant in that activity,

(2) The activity is conducted under a name which the public will not associate with licensee's practice of public accounting,

(3) The other business, occupation, or profession is not used to promote the practice of public accounting in any manner prohibited by Chapter 473, F.S.,

(4) Facilities used by the licensee in his public accounting practice and other activity conform to the requirements of 21A-26.001(3),

(5) The entity's dealings with the licensee's public accounting clients shall not violate the provisions of

Chapter 473, F.S. and 21A, Florida Administrative Code, relating to integrity and objectivity,

(6) The entity does not interpret financial statements, forecasts or projections audited, reviewed, compiled or prepared by others.

Specific Authority: 473.304, 473.315, F.S. **Law Implemented**: 473.315, F.S. **History**: New 9-16-84.

21A-24.001 Advertising

(1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading. Any advertisement or advertising shall be deemed by the Board to be fraudulent, false, deceptive, or misleading, if it, among other things:

(a) Contains a misrepresentation of facts; or

(b) Makes only a partial disclosure of relevant facts; or

(c) Creates false or unjustified expectations of beneficial assistance; or

(d) Appeals primarily to a layperson's fears, ignorance, or anxieties regarding his state of financial well-being; or

(e) Contains any representation or claims, as to which the licensee, referred to in the advertising, does not expect to perform; or

(f) Contains any other representation, statement, or claim which misleads or deceives; or

(g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy unless he has in fact received such recognition. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy in any advertisement must state that the use of the term is a self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or

(h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal

government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of this Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or indirectly, of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead. **Specific Authority**: 473.304,473.323, F.S. **Law Implemented**: 473.323,F.S. **History**: New 12-4-79, Amended 2-3-81, 12-29-83, Formerly 21A-24.01, Amended 5-20-91.
